Office-Supreme Court, U.S.
FILED
JUL 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GENERAL ATOMIC COMPANY,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

BRIEF OF INDIANA & MICHIGAN ELECTRIC COMPANY IN OPPOSITION

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July 14, 1981

Question Presented

Should this Court exercise its mandamus jurisdiction to vacate a declaratory order and judgment of a New Mexico trial court that an arbitration award was a nullity where an appeal of that order and judgment to the New Mexico Supreme Court is in process and where the order and judgment were entered in aid of final judgments of the New Mexico Supreme Court, which this Court has refused to review, that Petitioner had waived its alleged right to arbitrate and that the agreement to arbitrate was void?

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General Atomic Company ("GAC") has petitioned for a Writ of Mandamus ("Mandamus Petition") to the District Court of Santa Fe, New Mexico ("Santa Fe court") to vacate a judgment of District Judge Musgrove which declared that an arbitration award entered in favor of GAC against United Nuclear Corporation ("UNC") was void. Concurrently, GAC has moved that its Petition for a Writ of Certiorari to the California Court of Appeals (No. 80-2106) ("Certiorari Petition") seeking review of final judgments of the California courts dismissing GAC's application for confirmation of that arbitration award should be consolidated with the Mandamus Petition. Indiana & Michigan Electric Company ("I&M") opposes both the Mandamus Petition and the motion.[1]

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[1] The information required by this Court's Rule 28.1 appears in the Appendix to this Brief.

Statement of I&M's Interest

The Mandamus Petition makes not a single mention of I&M.[2] It asks this Court only to vacate Judge Musgrove's judgment voiding GAC's arbitration award against UNC. GAC took the position before Judge Musgrove that it did not, at this point, challenge the validity of the default judgment entered on behalf of I&M or the decision of the Santa Fe court on December 27, 1977 not to stay the trial of I&M's case pending arbitration. Transcript, Hearing before the Santa Fe court, December 23, 1980, at 191.[3]

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[2] I&M was never a party to the arbitration proceeding in California or to the California state court proceeding where GAC unsuccessfully attempted to have the arbitration award confirmed. Appropriately, GAC did not serve its Certiorari Petition on I&M. Any determination by this Court on the merits of the Certiorari Petition would not properly involve I&M's interests.

[3] Indeed, one of GAC's counsel effectively conceded that it could not base any attack on I&M's judgment on a claim that it was improperly denied a right to arbitrate effectively:

> So far as I&M is concerned . . . I don't know whether the injunction against arbitration affects the rights with regard to I&M. I'm not trying to make any final statement now and, frankly, I haven't thought through the question of whether it affects I&M; but I would think there's certainly an argument that since there were no arbitration rights vis-a-vis I&M that General Atomic had, that the injunction against arbitration and forestalling GAC from proceeding with arbitration with regard to UNC was not prejudicial with regard to I&M.
>
> * * *
>
> The reason that the court thing is illegal is that the court assumed jurisdiction when it did not have exclusive jurisdiction. So that's really what made it unlawful with regard to GAC and UNC.
>
> But with regard to General Atomic Company and I&M, that assertion could not be made because there was no arbitration.

Transcript, Hearing before the Santa Fe court, December 23, 1980, at 180-81. Nevertheless, a second GAC attorney subsequently tried to preserve such a claim. *Id.* at 190-91.

In view of GAC's concession, we would ordinarily regard the Mandamus Petition as irrelevant to I&M. I&M is not a party to any arbitration agreement and its rights are not challenged or properly involved in either petition. GAC, however, has heretofore urged this Court that if it be held that GAC preserved its rights to arbitration, all proceedings in the New Mexico courts subsequent to April 2, 1976 are void, including I&M's judgment.[4] Although this Court has refused to review these meritless claims, *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911 (1979), denying certiorari, and 101 S.Ct. 1966 (1981), dismissing the appeal and denying certiorari, GAC, having again tried to preserve these claims (*see* Transcript, Hearing before the Santa Fe court, December 23, 1980, at 190-91), has employed such sweeping language in its Mandamus Petition, at 5, 7 and 9, as to suggest that it might try to use this proceeding to undercut I&M's judgment as well as UNC's.

ARGUMENT

GAC asks this Court to determine summarily, by mandamus, that the order of the Santa Fe court nullifying the arbitration award which was entered in aid of the judgment

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[4] The Brief of I&M in Opposition in *General Atomic Co.* v. *United Nuclear Corp.*, No. 79-190, at 5-13 (reprinted as Appendix D to UNC's Motion to Dismiss or Affirm in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1360, at 196-204), sets forth in detail the process by which GAC first obtained a dismissal of I&M's action in the New York federal court on the representation that GAC sought a single trial in the New Mexico state court in which UNC, GAC and I&M would be bound, brought I&M into the pending New Mexico state action, expressly disclaimed any desire to arbitrate (even with UNC) any issues relating to I&M's contracts and then, when the trial was going badly for GAC, completely reversed its position and claimed, in the New Mexico Supreme Court and this Court, that I&M's judgment was invalid because trial of the I&M claims should have been stayed pending arbitration between UNC and GAC.

of the New Mexico Supreme Court, somehow violated this Court's decisions in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977) ("*Felter I*") and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) ("*Felter II*"). It seeks this relief although it now has a pending appeal in the New Mexico Supreme Court making, *inter alia*, precisely the same attacks upon Judge Musgrove's order as it urges this Court to consider by extraordinary writ. This Court's Rule 26 clearly sets forth what needs to be shown to warrant an extraordinary writ:

> To justify the granting of any [extraordinary] writ . . . , it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

GAC has made no such showing.

GAC has itself recognized the narrow scope of this Court's review on mandamus. Indeed, GAC has repeatedly argued that statements in this Court's opinion in *Felter II*, recognizing the right of the Santa Fe court to continue the trial of the underlying action and to pass upon UNC's claim that GAC had waived its arbitration rights, are *obiter dicta* in view of the narrow scope of mandamus jurisdiction. *E.g.*, GAC's Petition for a Writ of Certiorari in *General Atomic Co.* v. *United Nuclear Corp.*, No. 79-190, at 19 n.16, 32-33 (reprinted as Appendix B to UNC's Motion to Dismiss or Affirm in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1360 at 34 n.16, 47-8); Transcript, Hearing before the Santa Fe court, December 23, 1980, at 183-84. But if, as GAC then urged, the decisions in *Felter I* and *Felter II* dealt only with the impropriety of a preliminary injunction barring resort to federal forums, the very narrow limits to

the reach of those decisions which GAC has posited preclude the exercise of mandamus jurisdiction with respect to Judge Musgrove's order, which clearly has no relation to such an injunction.[5]

Surely, if Judge Musgrove's order improperly overstepped what was needed to preserve the efficacy of the judgments of the New Mexico Supreme Court, that court is the proper forum of first instance to correct his decision, and GAC offers no convincing basis to warrant this Court's exercise of its extraordinary jurisdiction to involve itself in a question which the New Mexico Supreme Court has ample powers to determine in the ordinary course.

We oppose the motion to consolidate on the ground that the Mandamus Petition raises different and narrower issues than are presented by the Certiorari Petition (which issues are wholly and concededly irrelevant to I&M) and on the further ground that it would seem that the Certiorari Petition is without merit in view of familiar *res judicata* principles. *See, e.g., Durfee* v. *Duke,* 375 U.S. 106 (1963); *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940); *Stoll* v. *Gottlieb,* 305 U.S. 165 (1938).

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[5] I&M reads *Felter II* more broadly than GAC as indicating that this Court recognized that the New Mexico courts had jurisdiction to try the suit, to determine such ancillary questions as whether GAC had waived its arbitration rights, and to enter judgment. Clearly, this reading would equally counsel against the appropriateness of mandamus here. We submit that it is not an unfair reading of this Court's decision on two occasions not to grant review of the judgments of the New Mexico Supreme Court, *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, *cert. denied*, 444 U.S. 911 (1979) and 1980-81 Trade Cases (CCH) ¶ 63, 639 (N.M. Sup. Ct., August 29, 1980), *appeal dismissed and cert. denied*, 101 S.Ct. 1966 (1981), that this Court found no impropriety in the decisions of the New Mexico courts sufficient to warrant a hearing. *See* Opinion of Judge Musgrove, Mandamus Petition App. A at 7a.

CONCLUSION

By reason of the foregoing, and of the arguments made in UNC's Brief in Opposition, with which we concur, we respectfully submit that the Petition for Mandamus and the motion to consolidate should be denied.

Respectfully submitted,

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APPENDIX

Parent: American Electric Power Company, Inc.

Affiliates and Subsidiaries:

American Electric Power Service Corporation
Appalachian Power Company
Beech Bottom Power Company, Inc.
Blackhawk Coal Company
Cardinal Operating Company
Cedar Coal Co.
Central Appalachian Coal Company
Central Coal Company
Central Ohio Coal Company
Central Operating Company
Colomet, Inc.
Columbus and Southern Ohio Electric Company
Franklin Real Estate Company
Indiana Franklin Realty, Inc.
Indiana-Kentucky Electric Company
*Indiana & Michigan Electric Company
Kanawha Valley Power Company
Kentucky Power Company
Kingsport Power Company
Michigan Electric Power Company
Michigan Gas Exploration Company
Michigan Power Company
Ohio Power Company
Ohio Valley Electric Corporation
Price River Coal Company, Inc.
Simco Inc.
Southern Appalachian Coal Company
Southern Ohio Coal Company
Twin Branch Railroad Company
West Virginia Power Company
Wheeling Electric Company
Windsor Power House Coal Company

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* Respondent.